

HARVEY SHEEHAN
and
HAZEL HOLLAND MUDON

IBLA 78-532

Decided January 16, 1979

Appeal from decision of the South Dakota Area Office, Bureau of Land Management, apportioning lands between grazing lease applicants, MT 020-78-2.

Reversed and remanded.

1. Grazing Leases: Generally—Grazing Leases: Apportionment of Land

An area manager's decision apportioning lands between two grazing lease applicants ordinarily will not be disturbed where both applicants have equal preference rights, the apportionment is consistent with the regulatory criteria of 43 CFR 4121.2-1(d)(2) (1977), and the decision is not shown to be arbitrary or capricious. However, where a new statute, sec. 402 of the Federal Land Policy and Management Act of 1976, 43 U.S.C.A. § 1752(c) (West Supp. 1978), dictates that in certain circumstances "the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease," the apportionment must be conformed therewith.

2. Grazing Leases: Generally—Grazing Leases: Apportionment of Land—Regulations: Generally—Regulations: Interpretation—Regulations: Validity

In view of 43 U.S.C.A. § 1752(c) (West Supp. 1978), which dictates that in certain circumstances the present grazing user shall have a right of first refusal for any new lease,

43 CFR 4110.5 (43 FR 29070), must be read in pari materia therewith and with 43 CFR 4130.2(e) (43 FR 29072) to be construed as a valid regulation and must be interpreted not to apply where the present grazing user desires a new lease and otherwise meets the statutory and regulatory criteria.

APPEARANCES: Charles M. Thompson, Esq., May, Adam, Gerdes & Thompson, Pierre, South Dakota, for appellant Harvey D. Sheehan; and William J. Srstka, Jr., Esq., Duncan, Olinger, Srstka, Maher, & Lovald, P.C., for appellant Hazel Holland Mudon.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Hazel Holland Mudon and Harvey Sheehan each separately appeal from a decision of the South Dakota Area Manager, Bureau of Land Management (BLM), dated May 24, 1978, by which an apportionment of land was made between two grazing lease applicants (appellants herein) for the same lands within the South Dakota Resource Area (MT-020-78-2). The lands in issue, located in Stanley County, South Dakota, contain 280 acres and are described as follows: T. 7 N., R. 29 E., sec. 27, SW 1/4, W 1/2 SE 1/4, SE 1/4 SE 1/4, Black Hills guide meridian. Sheehan who, together with his predecessors in interest, had leased this land since 1960, filed application to renew his lease on March 24, 1978. Mudon's grazing lease application for the same land had been filed on February 13, 1978.

In his decision the area manager stated that: a field inspection was held on May 22, 1978; both applicants were qualified property owners and livestock operators; both had a need for livestock forage; both had an historical use of the area; the topography was quite rough with sharp draws and narrow-topped ridges; the Mudon ranch would benefit from the use of the area for livestock movement east to west; and a county road allowed public access to the lands. The area manager divided the land between the two applicants as follows: Hazel Mudon was awarded the W 1/2 SE 1/4, SE 1/4 SE 1/4 sec. 27 for a total of 120 acres. Harvey Sheehan was awarded the SW 1/4 sec. 27 for a total of 160 acres. The division was made subject to the following conditions:

1. The fence on the northeast side of the public lands * * * will be relocated to the new location * * * by Hazel Mudon.
2. All fence materials not used will be stockpiled beside the county road in the SW 1/4 SE 1/4.
3. The location of the new fence will be as near as practicable to the 1/4 line in the S 1/2 of Section 27.

4. This fencing will be completed by September 30, 1978.

In his statement of reasons Sheehan asserts that the division is unfair because the fence was constructed and paid for by the Sheehans; that Mudon has used the land for grazing gratis for many years, and that Sheehan has leased the land for many years.

Mudon asserts in her statement of reasons that the land was leased by her predecessors in interest in 1948, that this lease was terminated in 1956, when the U.S. Corps of Engineers took the land for the Oahe Dam pursuant to PLO 1312. She points out that she applied for, but did not obtain, a lease to the land in 1968. She further states that she owns land on either side of the land in question and that loss of part of the land would divide and cripple her ranch. She asserts that there is a dam upon the land in question which was built by her predecessors in interest and that due to the Sheehan lease she has been deprived of use of this dam.

Sheehan denies that the dam on the property was built by Mudon's predecessors in interest.

The file contains two memoranda by the area manager, dated June 26 and July 14, 1978, which comment upon several of the points raised by the appellants and amplify the decision appealed from. The area manager points out that:

- a) Mudon's predecessors in interest had a lease on the subject land from April 6, 1948 to April 5, 1958;
- b) the fence, which was not authorized by BLM, was constructed approximately 1961, when Sheehan held a lease on the land;
- c) the dam was not authorized and did not enter into the decision appealed from;
- d) the NE 1/4 SE 1/4 was withdrawn for Oahe reservoir by public land order 1312 between April 6, 1958 and October 11, 1960, when the land was unleased.

The June 26, 1978, memorandum concludes as follows:

Since 1962 W. K. Holland and Hazel Mudon have tried to regain the public lands leased in their 4/6/48 lease. This has caused hard feelings and considerable time and effort to be spent by all parties concerned. As both applicants have the same preference rights, the decision to split this area was based on the general needs of both applicants, and on the topography of the area. They both use the lands for grazing livestock and have need of the forage produced on

the public land. The topography is rough breaks and the ridges run north to south. This decision would allow Mudon livestock easier movement along the Oahe reservoir shoreline.

On October 6, 1978, the Board issued an order affording the appellants an opportunity to make additional showings in response to June 26 and July 14 memoranda. Counsel for appellant Mudon has submitted a newspaper clipping from the Daily Capital Journal, Pierre, South Dakota, dated August 18, 1978. The article states that on August 11, 1978, "Title to approximately 34,000 acres of land * * * was transferred from Harvey Sheehan to Lowell Light and Associates of Wheeling, Illinois for \$4,565,000." No additional submissions have been received from appellant Sheehan.

[1] The decision appealed from was based on 43 CFR 4121.2-1(d)(2) (1977), which states the criteria for determining the apportionment of lands between conflicting applicants for grazing leases:

The Authorized Officer will allocate the use of the public land on the basis of any or all of the following factors: (i) Historical use, (ii) proper range management and use of water for livestock, (iii) proper use of the preference lands, (iv) general needs of the applicants, (v) topography, (vi) public ingress and egress across preference lands to public lands under application * * * (where access is not presently available), and (vii) other land use requirements. [Footnote omitted.]

Cf. 43 CFR 4110.5 (43 FR 29070 of July 5, 1978). The area manager considered several of these elements and the allegations presented on appeal fail to show how his apportionment of the land, including the stipulations, was either arbitrary or inequitable to either appellant. Nor has Mudon, to whom the fencing requirement applies, objected to that aspect of the decision. Since no convincing reason to disturb the area manager's decision has been offered, ordinarily the decision would be sustained. John Rattray, 36 IBLA 282 (1978); Wesley Leininger, 28 IBLA 93 (1976). Cf. 43 CFR 4.478(b) (1977).

[2] However, section 402(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C.A. § 1752(c) (West Supp. 1978), dictates that in certain circumstances "the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease." The record does not reveal that Sheehan fails to satisfy any of the statutory conditions precedent for that preference. H.R. Rept. No. 94-1163 buttresses our conclusion as to the meaning of the statute by reciting that:

Subsection (c) specifies that upon expiration of a least [sic] or permit existing users would have a right of first refusal for any new lease or permit, provided that

grazing will be continued by the Secretary concerned and they are in good standing and accept the terms and conditions of the new lease or permit.

But 43 CFR 4110.5 (43 FR 29070) 1/ provides as follows:

4110.5 Conflicting applications.

When more than one qualified applicant applies for livestock grazing use of the same public land and/or where additional forage or additional land acreage becomes available, the authorized officer may allocate grazing use of such land or forage consistent with the land use plans on the basis of any of the following factors:

- (a) Historical use of the public land (see § 4130.2(d));
- (b) Proper range management and use of water for livestock;
- (c) General needs of the applicants' livestock operations;
- (d) Public ingress and egress across privately owned or controlled land to public lands;
- (e) Topography;
- (f) Other land use requirements unique to the situation. [Emphasis supplied.]

In the case at bar, Sheehan as the holder of the present lease, has a right of first refusal if he otherwise meets the other statutory criteria. The regulation, 43 CFR 4110.5 (43 FR 29070), must be read in pari materia with 4130.2(e) (43 FR 29072), which states:

- (e) Permittees or lessees holding expiring grazing permits or leases shall be given first priority for receipt of new permits or leases if:
 - (1) The lands remain available for livestock grazing in accordance with land use plans (see subpart 4120);
 - (2) The permittee or lessee is in compliance with the regulations contained in this part

1/ This appears in the Federal Register of July 5, 1978.

and the terms and conditions of his grazing permit or lease; and

(3) The permittee or lessee accepts the terms and conditions to be included in the new permit or lease by the authorized officer.

The apparent fact that there may now be a successor to appellant Sheehan's interest is beyond the ambit of this decision; we hold only that the decision appealed does not comport with the statutory criteria of FLPMA and with 43 CFR 4130.2(e) (43 FR 29072). The qualifications of Sheehan's successors as grazing lease applicants are a matter for BLM's original jurisdiction.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and remanded for appropriate action consistent with 43 CFR 4130.2(e) (43 FR 29072).

Frederick Fishman
Administrative Judge

We concur.

Douglas E. Henriques
Administrative Judge

James L. Burski
Administrative Judge

